

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2005-57-C - ORDER NO. 2005-494
SEPTEMBER 9, 2005

IN RE:	Joint Petition for Arbitration of NewSouth)	ORDER
	Communications Corporation, NuVox)	
	Communications, Incorporated, KMC)	
	Telecom V, Incorporated, KMC Telecom III)	
	LLC, and Xspedius [Affiliates] of an)	
	Interconnection Agreement with BellSouth)	
	Telecommunications, Inc. Pursuant to Section)	
	252(b) of the Communications Act of 1934,)	
	as Amended)	

This Order rules on several matters before the hearing examiner in this docket: 1) BellSouth's objection to the Joint Petitioners' submission of the prefiled testimony of Hamilton E. Russell, 2) a request from Hamilton E. Russell that certain of his testimony be withdrawn, and 3) a request from Kenneth L. Millwood, Esquire, of Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins") that the Commission withdraw Russell's testimony. For the reasons stated herein, BellSouth's objection is overruled and the requests of Messrs. Russell and Millwood to withdraw Russell's testimony are declined.

This matter originated with BellSouth's motion to strike Russell's testimony, filed on June 14, 2005, which argued that Russell has a conflict of interest which prevents him from testifying in this matter. After considering the memoranda of the parties, and hearing arguments from counsel, I granted BellSouth's motion to strike Russell's rebuttal and hearing testimony, finding that his testimony had been materially incomplete because

he had failed to disclose his employment with the law firm of Nelson Mullins, a firm which represents BellSouth in several other proceedings not related to this docket. In the Order, I gave the Joint Petitioners fifteen days to prefile new testimony and exhibits for the limited purpose of testifying as to those matters addressed in the stricken testimony.

On August 5, 2005, the Joint Petitioners filed two pages of supplemental testimony given by Russell, and requested that the new filing be appended to Russell's earlier prefiled rebuttal and hearing testimony, and that the collective testimony be entered into the final record in arbitration. In this new filing, Russell did not explicitly readopt his prior testimony. On August 10, 2005, BellSouth objected to the introduction of Russell's testimony, essentially renewing its motion to strike Russell's testimony, continuing to assert that he has a conflict of interest which prevents NuVox's introduction of his testimony.

On August 15, 2005, the Commission received a letter dated August 11, 2005, from Hamilton E. Russell requesting that his testimony be withdrawn. Russell's letter was accompanied by a letter from Kenneth L. Millwood, Esquire, of Nelson Mullins, who also requested the withdrawal of Russell's testimony. Both Russell and Millwood cited a commitment made to BellSouth and NuVox (one of the Joint Petitioners who is also a client of Nelson Mullins) that Russell would not testify other than by "subpoena and deposition".

On August 23, 2005, the Joint Petitioners responded to BellSouth, Russell, and Millwood. In their response, the Joint Petitioners assert that Russell does not have a conflict of interest which prevents him from testifying, and that neither Russell nor

Millwood, have the authority to withdraw his testimony, which was submitted by the Joint Petitioners. The Joint Petitioners urged the Commission to accept Russell's testimony and dispense with further cross-examination.

On August 26, 2005, BellSouth countered that the Joint Petitioners' submission of Russell's testimony was contrary to the terms of the June 21, 2005, Order which allowed them to submit new testimony. BellSouth argues that the June 21st Order did not give the Joint Petitioners the option of requesting reinstatement of Russell's stricken testimony. BellSouth asked the Commission to accept Russell's withdrawal of his prefiled testimony, rendering BellSouth's objection to that testimony moot. BellSouth also asked the Commission to close the proceedings and order the parties to submit prehearing briefs without any further testimony from the Joint Petitioners. In the alternative, BellSouth suggests that the Commission could order the Joint Petitioners to introduce the testimony of a different witness whom they presented in parallel arbitration proceedings which were recently held in Mississippi.

On July 20, 2005, I ruled that Russell's rebuttal testimony as to his employment was incomplete and that BellSouth had been deprived of the opportunity to cross-examine him and make informed objections to his rebuttal and hearing testimony. The Commission acknowledged that no party had argued that Russell's omission was willful or malicious. So as to give the Joint Petitioners the opportunity to cure this defect in Russell's testimony, I granted BellSouth's Motion to Strike and gave the Joint Petitioners fifteen (15) days to introduce new rebuttal testimony on the topics previously addressed by Mr. Russell.

The Order acknowledged the possibility that the Joint Petitioners might recall Russell to present rebuttal testimony. The Order did not speak to the possibility that the Joint Petitioners would resubmit Russell's previously filed rebuttal testimony, as they have done with the additional pages of supplemental testimony. However, the Joint Petitioners are entitled to introduce this testimony if they wish to do so. The Commission has no reason to exclude Russell's testimony in its entirety solely because of his employment with Nelson Mullins. Under appropriate circumstances, an attorney may be called to testify as a fact witness in a proceeding. Orangeburg Sausage Company v. Cincinnati Insurance Company, 316 S.C. 331, 347 450 S.E.2d 66, 75 (Ct. App. 1994); State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). In this case, Russell may testify as a fact witness. If BellSouth believes that parts of Russell's testimony should not be admitted, it must raise specific objections to the portions of the testimony which it claims are excludable. Foster v. South Carolina Dep't of Highways and Public Transportation, 306 S.C. 519, 523, 413 S.E.2d 31, 33 (1992) ("where evidence is objected to in its entirety, some portion of which is admissible, such objection is not well taken, even though some portions of the evidence are in fact inadmissible"). In the absence of specific objections, Russell's testimony will be admitted and subject to cross-examination.

The Commission must also deny Russell and Millwood's request to withdraw his testimony. This request would be more appropriately directed to the Joint Petitioners, not to the Commission. Neither Russell, nor Millwood and his law firm Nelson Mullins, are parties to this proceeding, therefore they have no standing to request withdrawal of

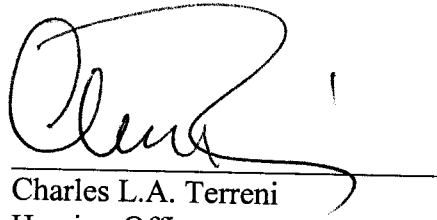
testimony introduced by another party. Furthermore, even if Russell and Millwood had standing to request withdrawal of sworn testimony, their commitments to BellSouth and NuVox do not give the Commission grounds to accede to their request.

In its submission of August 26, 2005, BellSouth correctly points out that prefiled testimony is not admitted into the record until presented at a hearing. Public Service Commission Reg. 103-869(C) provides in pertinent part; “A witness may read into the record, as his direct testimony, statements of fact or expressions of his opinion prepared by him, or written answers to interrogatories of counsel. A prepared statement of a witness may also be received as an exhibit.” *See also* ALJD Rule 25(D).

The Order of July 20, 2005, did not expressly speak to the introduction of the prefiled testimony, but this requirement was implicit as the Order made clear that any witness offered by the Joint Petitioners would be available at a hearing for cross-examination. The Joint Petitioners may introduce Russell’s prefiled testimony, with supplement, at the same hearing before the Commission in which he will be made available for cross-examination. BellSouth will be entitled to raise appropriate objections to Russell’s testimony and cross-examine him with its new found knowledge of his employment with Nelson Mullins.

Therefore, in keeping with the Order of July 20, 2005, BellSouth may now file surrebuttal testimony within ten (10) days of receipt of this Order. Thereafter, the Commission will hold a hearing to consider the newly filed testimony, hear cross-examinations, and make such rulings as necessary.

AND IT IS SO ORDERED:



Charles L.A. Terreni
Hearing Officer